IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
LAWRENCE JOSEPH HESS,	)	**Supreme Court No. SC 92923**
	)	
Respondent.	)	

RESPONDENT'S BRIEF

Lawrence Joseph Hess, Pro Se
Respondent
Missouri Bar #24789
Of Counsel to
The Rex Carr Law Firm, LLC
401 Alta Dena Court
St. Louis, MO 63130
314-725-9894 (Telephone)
Lawrencejhess7@gmail.com

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

1. No disciplinary action has been taken against Mr. Hess in his more than 37 years of law practice in the state of Missouri. (Informant's Brief, p. 23) No bar complaints were filed against Mr. Hess in the Illinois disciplinary matter by any of his Illinois clients, nor any Illinois judges. (Hearing Board Report, pp. 3, 8-11) (Administrator Exhibits 1-15, 20-23, 25, 29, 36-40) Mr. Kanoski and others on his behalf filed the two Illinois bar Complaints against Mr. Carr and Mr. Hess. (App. 9-10; 11-12) Mr. Kanoski was a defendant in *Hess v. Kanoski & Associates, et al.*, an Illinois civil law suit pending in federal court, which involved violations of the Illinois Wage Payment and Collection Act, breach of contract, and other claims, which law suit had been filed by Mr. Carr on behalf of his client, Mr. Hess, and in Mr. Carr's opinion Mr. Kanoski owed Mr. Hess millions of dollars in attorney's fees. (R. 337, 471-472; 624-625)

2. In April of 2008, Mr. Hess hired Mr. Carr and the Rex Carr Law Firm to represent him in his legal matters. (Hearing Board Report, p. 34) The Complaint alleged that at all times and in all matters set out in the Complaint, Mr. Hess was being represented by Mr. Carr as Mr. Hess's attorney. (Hearing Board Report, pp. 1-2)

3. Mr. Hess never practiced law as the client in any of the legal matters referenced in the Illinois disciplinary Complaint (C9-19; Informant's Appendix 95-113), nor did he ever file or bring any action in a court of law in said matters,

nor was he the attorney of record in said matters. (Hearing Board Report, pp. 1-44)

4. The Complaint charged that only client conduct on the part of Mr. Hess had violated Rule 3.1 and 8.4(a)(5) of the Illinois Rules of Professional Conduct, while the claimed violations of Illinois Supreme Court Rule 770 were later dismissed by the Review Board. Count I of the Complaint referenced a lawsuit for attorney fees, filed by Mr. Carr on behalf of his client, Mr. Hess, against Mr. Hess's clients, Mr. and Mrs. Loyd. Count II referenced notices of three statutory attorney liens in favor of client Hess, which had been served by Mr. Carr on behalf of Mr. Hess upon the defendants in the underlying civil actions, which civil actions had been filed years before by Mr. Hess, while the attorney of record for his clients, the Loyds, Mrs. Eller, and Mr. Thompson. Count III referenced a lawsuit for breach of contract, Illinois Wage Payment and Collection Act violations, and other claims for damages filed by Mr. Carr on behalf of his client, Mr. Hess, against Mr. Hess's employer, Kanoski & Associates, Mr. Kanoski (sole shareholder of Kanoski & Associates (R. 68)), and Mr. Blan. The Hearing Board found in favor of Mr. Carr and Mr. Hess and against the Administrator as to the allegations contained in Count III, because of a failure to prove the allegations set forth in Count III. No party challenged that Count III ruling before the Review Board. (Review Board Report, p. 9)

5. Even though there was no proof presented to the Hearing Board that Mr. Hess had practiced law for any client under Rule 3.1 in any legal proceeding

before a court of law (lawsuit in Count I and three attorney lien claims in Count II) (Hearing Board Report, pp. 1-44), the Hearing and Review Boards still concluded that Mr. Hess, even solely as a client, could be found guilty of professional misconduct under the principal charge under Rule 3.1 as well as a subsidiary charge under Rule 8.4(a)(5). Such findings by the Hearing and Review Boards conflict with the Illinois Supreme Court's ruling in *In Re Greenblatt*, 92 CH 269, No. M.R. 10357 (1994) where the Illinois Supreme Court had approved and confirmed the Report and Recommendation of the *Greenblatt* Review Board, as well as with Illinois Rule of Professional Conduct 3.1 with Comments (2010), both of which state that Rule 3.1 does not apply to the client in a legal proceeding but only to the attorney/advocate representing a client in a legal proceeding. It should be noted that the Illinois Supreme Court never approved or confirmed the Review Board Report in the Illinois disciplinary action against Mr. Hess, and there was no briefing or oral argument presented to the Illinois Supreme Court, nor did that Court issue any opinion in said disciplinary action. (App. 1)

6. The Hearing Board made numerous findings of fact and rendered its judgment based upon facts and misconduct which had not first been factually alleged in the Administrator's Complaint, which conflict with the Illinois Supreme Court rulings in the cases of: *In Re: Beatty*, 118 Ill.2d 489, 496 (1987), *In Re: Smith*, 168 Ill.2d 269, 289-290 (1995), and *In Re Doyle*, 144 Ill.2d 451, 471 (1991).

7. Mr. Hess received a B.A. degree from St. Louis University, Magna Cum Laude, in 1972, and later graduated from St. Louis University School of Law in 1975. He then served for four and a half years as a Judge Advocate, while a Captain in the United States Air Force from 1975 to 1980. In 1980 he was awarded The Meritorious Service Medal by the President of the United States for outstanding service to the United States Air Force. He also received an Honorable Discharge from the United States Air Force. Mr. Hess taught the Law of War/Geneva Conventions to military personnel while he was stationed in Germany. For at least 23 years, Mr. Hess has been rated by his peers to be deserving of the AV Rating provided him by the Martindale Hubbell Law Directory. (R. 527-534)

ARGUMENT

(ILLINOIS)

I. The Illinois Supreme Court erred in ordering discipline against Mr. Hess's license in Illinois due to the Review Board error in upholding the Hearing Board findings that the Administrator had proven by clear and convincing evidence that Mr. Hess had committed the misconduct charged against him in Count I and II of the Complaint, in violation of Rule 3.1 and 8.4(a)(5) of the Illinois Rules of Professional Conduct, because said Rules have no legal application or jurisdiction over Mr. Hess as a client being represented in legal proceedings by his attorney of record, and while Mr. Hess was not practicing law for any client. As a result, the motion for reciprocal discipline against Mr. Hess's Missouri license under Missouri Rule 5.20 should be denied.

The Review Board committed reversible error in upholding the Hearing Board findings that the Administrator had proven by clear and convincing evidence that Mr. Hess, acting solely as a client and not practicing law for a client, had committed attorney misconduct in violation of Rules 3.1 and 8.4(a)(5) of the Illinois Rules of Professional Conduct (1990) under Counts I and II of the Complaint. (Count III of the Complaint will not be addressed herein, because the Hearing Board found that the Administrator did not prove the charges in Count III concerning the federal lawsuit brought by Mr. Carr on behalf of Mr. Hess against Kanoski and Associates, Mr. Kanoski, and Mr. Blan, and no party had challenged

that ruling on review. [Review Board Report, p. 9]) In attorney disciplinary proceedings in Illinois, professional misconduct must be proved by clear and convincing evidence. *In Re Storment*, 203 Ill.2d 378, 390 (2002). At the same time, it is the Supreme Court's duty to determine whether an attorney's actions amounted to a violation of the Code of Professional Responsibility. *In Re Discipio*, 163 Ill.2d 515, 527 (1994). The inherent power to define and regulate the practice of law in Illinois resides in the Illinois Supreme Court. *Applebaum v. Rush University Medical Center*, 231 Ill.2d 429 (2008). The very first sentence to the "Preamble" to the Illinois Rules of Professional Conduct (1990) establishes that said Rules apply to the practice of law in Illinois in stating: "The practice of law is a public trust." The first paragraph continues with various laudatory responsibilities of lawyers, including their loyalty to the best interests of their clients. The second paragraph of the Preamble then begins: "To achieve these ends **the practice of law is regulated by the following rules. Violation of these rules is grounds for discipline.**" (Emphasis added.) Also, the "Scope" of the Rules of Professional Conduct (2010) at paragraph [14] states: "Comments and the Preamble and Scope do not add obligations to the Rules but provide guidance for **practicing** in compliance with the Rules." In the same paragraph, it is also stated that these rules "should be interpreted with reference to the purposes of legal representation and of the law itself." (All emphasis added.) Nowhere in either the 1990 or 2010 Preamble, Comments, or anywhere else within the Rules themselves, does it ever state that the Illinois Rules of Professional Conduct have

any application to or jurisdiction over a client (including a client that is also a licensed attorney in the State of Illinois), who is represented by and following the legal advice of his/her chosen attorney during judicial proceedings. There was never any allegation pled in the Complaint or evidence presented to the Hearing Board in Illinois that Mr. Hess, while practicing law by representing any client, brought into a court of law any legal proceeding, which action is a required fact which must first be pled and then proved for any application of Rule 3.1. Mr. Hess's involvement in the legal proceedings in Illinois was always, solely as the plaintiff/client at all times following the legal advice of his chosen attorney and law firm, Bruce Carr and The Rex Carr Law Firm. (R. 338; 448) "The attorney is the 'manager' of the case, and therefore, strategic and tactical decisions are within the exclusive province of trained counsel, who possesses superior ability to make them." *People v. Johnson*, 220 Ill.App.3d 550, 558 (1st Dist., 1991). "Clients may generally rely on the advice of counsel (recognizing that clients hire lawyers for the purpose of relying on their advice)." *Keating v. Golding*, 277 Ill.App.3d 953, 958 (1st Dist., 1996) "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." (Comment to Illinois Rule 1.2 at paragraph [2]. (2010)) Because all of the evidence before the Hearing Board proved Mr. Hess always acted as a client following the legal advice of his attorneys, and Mr. Hess did not engage in the practice of law with a client in any of the legal proceedings set out in Counts I and II, and the Review Board

admitted that the Illinois disciplinary matter arose from Mr. Carr's representation of Mr. Hess and that Mr. Carr on behalf of Mr. Hess served three notices of attorney liens and filed one lawsuit for breach of contract (Review Board Report, pp.1, 6, 11), none of the purported principal violations of Illinois Rule 3.1 can be legally returned against Mr. Hess, acting solely as a party plaintiff/client in judicial proceedings.

Additionally, Illinois Rule 3.1 (1990 and 2010) has repeatedly been held to have no application to or jurisdiction over a party/client, even an attorney/client, who is represented by an attorney in a legal proceeding. In the case of *In Re Greenblatt*, 92 CH 269 (1994), the review board held: "Rule 3.1 like Rule 1.2(f) is directed at the attorney working on behalf of the client rather than the client himself." That legal holding in the report of the review board was later *approved and confirmed* by the Illinois Supreme Court in *In Re Greenblatt*, 92 CH 269, No. M.R.10357 (1994). (App. 2) That same legal holding in *Greenblatt* was years later cited with approval in another case, *In Re Dore*, 07 CH 122 (Hearing Board, p. 41, 2009), which legal holding was left undisturbed by the review board and later the Illinois Supreme Court at *In Re Dore* 07 CH 122, No. M.R. 24566 (2011). The Illinois Supreme Court then adopted on July 1, 2009, with an effective date of January 1, 2010, a nearly identical version of Rule 3.1 (1990), which 2010 Rule now includes a "Comment" section, adopted by the Court, which explains the meaning and legal application of Rule 3.1. The Preamble to the 2010 Rules of Professional Conduct specifically states in paragraph 21: "[21] The Comment

accompanying each Rule explains and illustrates the meaning and purpose of the Rule." (Emphasis added.) The "Comment" section to Rule 3.1 (2010), clearly states at paragraph [1] that Rule 3.1 applies only to the attorney or "advocate" who is using a legal proceeding for his "client's cause." "The law, both procedural and substantive establishes the limits within which an **advocate** may proceed." "Accordingly, in determining the proper scope of **advocacy**...." Paragraph [2] of the Comment also reinforces the same meaning of Rule 3.1 by stating: "The **filing** of an action or defense or similar action taken for a client is not frivolous...." (All emphasis added.) There is not in Rule 3.1 (1990), and certainly not in the 2010 Rule with its explanatory Comment, any language which provides Rule 3.1 with any legal jurisdiction over a client involved in a legal proceeding, while being represented therein by the attorney of his/her choice. Even the Administrator's counsel in closing argument before the Hearing Board admitted: "Now Rule 3.1 is aimed at the conduct of the lawyer." (R. 605) A copy of Rule 3.1 with Comment [Adopted July 1, 2009, effective January 1, 2010] is attached hereto at App. 3-5.

In the *Greenblatt* case the attorney/client was ultimately found not guilty of violating Rule 3.1 and Rule 8.4(a)(5) (1990), even though Mr. Greenblatt had been found to be very angry with his client and had been charged with harassing him by suing his client for slander, liable, and abuse of process, upon the legal advice of his two lawyers, and his lawsuit had been alleged to have been frivolous. For the same legal principles that attorney/client Greenblatt was found not guilty of

harassing his client and not violating Rule 3.1 and Rule 8.4(a)(5), Mr. Hess also should not legally have been found guilty of violating Rule 3.1 and Rule 8.4(a)(5).

Although Mr. Hess had cited to the Hearing and Review Boards the Illinois Supreme Court's *approval and confirmation* of the report of the review board in *In Re Greenblatt*, supra, the Hess Hearing Board Report still ignored the *Greenblatt* case completely, and the Hess Review Board Report made no reference to the Illinois Supreme Court's *approval and confirmation* of the *Greenblatt* decision as to attorney/clients, while the Hess Review Board merely agreed with the Hess Hearing Board conclusion that if the Illinois Supreme Court had wanted Rule 3.1 to not be applied to attorney/clients, such as Mr. Hess, the Illinois Supreme Court would have put such language into Rule 3.1. (Hearing Board Report, p. 14) Additionally, the Hearing and Review Boards completely ignored the Illinois Supreme Court's instruction and direction within the "Comment" section of Rule 3.1, adopted by the Illinois Supreme Court on July 1, 2009, nearly ten months before the Hess Complaint was filed in the Illinois disciplinary matter, with an effective date on January 1, 2010, almost four months before the filing of the Hess Complaint in the Illinois disciplinary matter on April 27, 2010. The Comment to Rule 3.1 is clear in explaining that the meaning and purpose of Rule 3.1 is to regulate the conduct of an attorney practicing law for his client in a legal proceeding, and not to regulate the conduct of the client being represented by his/her attorney in a legal proceeding. "A disciplinary proceeding must strictly comply with the Code of Professional Responsibility…." *In Re Beatty*, 118 Ill.2d

489, 496 (1987). According to the above authorities, the Illinois Supreme Court has clearly and repeatedly ruled that disciplinary Rule 3.1 only applies to the attorney who brings the legal proceeding on behalf of his client and not the represented client himself; and that client conduct in a legal proceeding is not disciplinable under Rule 3.1. It is the responsibility of the Supreme Court to determine what conduct is disciplinable. *In Re Owens*, 125 Ill.2d 390, 400 (1988). The Illinois Supreme Court in *Greenblatt* and Rule 3.1 with Comment (2010) could not have been clearer in setting forth the legal bounds of jurisdiction of Rule 3.1 in Illinois. The Rules of Court the Illinois Supreme Court has promulgated "have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Roth v Illinois Farmers Insurance Company*, 202 Ill.2d 490 (2002) Both the Hearing and Review Boards in Illinois were in error in not enforcing Rule 3.1 and its Comment as the law in the state of Illinois.

Also nothing in Rule 3.1 provides that a client's access to the courts to enforce legal rights is to be impeded by that Rule. Further, "a disciplinary proceeding must …not violate constitutional protections, including those of freedom of speech." *In Re Beatty*, 118 Ill.2d 489, 496 (1987). Likewise in *Berlin v. Nathan*, 64 Ill.App.3d 940, 951 (1st Dist., 1978) the court held: "It is the overriding public policy of Illinois that potential suitors must have free and unfettered access to the courts. The Illinois courts have consistently adhered to the established policy 'that the courts should be open to litigants for settlement of their rights without fear of prosecution for calling upon the courts to determine such

rights and have never deviated from the philosophy expressed in *Smith v. Michigan Buggy Company*, 175 Ill. 619, 628 (1898) that: 'It must be remembered that the courts are open to every citizen; and every man has a right to come into a court of justice, and claim what he deems to be his right, without fear of being prosecuted for heavy damages.'" (Emphasis added.) In all counts of the Complaint, Mr. Hess, as the client represented by Mr. Carr and The Rex Carr Law Firm, was exercising his constitutional right of free and unfettered access to the courts of Illinois to enforce his legal rights, and Rule 3.1 cannot legally as a matter of law be used to impede such rights. "Basic rights have little meaning without access to the judicial system which vindicates them." (Preamble to Illinois Rules of Professional Conduct (1990))

The Hearing and Review Boards also committed reversible error in finding/upholding that Mr. Hess could still be found guilty of professional misconduct under Rule 8.4(a)(5), even if the Administrator had not proven a violation of the principal allegation under Rule 3.1. (Hearing Board Report, p. 33; Review Board Report, p. 15) In the case of *In Re Corboy*, 124 Ill.2d 29, 37 (1988) the Illinois Supreme Court found that although the Administrator's Complaints had charged the respondent attorneys with violations of Rule 1-102(a)(5) (conduct prejudicial to the administration of justice; now Rule 8.4(a)(5)) and Canon 9, "the principal allegation on which the subsidiary charges stand or fall is that the respondents violated Rule 7-110(a)" (giving or loaning a thing of value to a judge). (Emphasis added.) Likewise, in the case of *In Re Jones, Jr.*, 125 Ill.2d

371, 377 (1988) the Illinois Supreme Court stated that while the Administrator had charged respondent with violating Rule 1-102(a)(5)(conduct prejudicial to the administration of justice; now Rule 8.4(a)(5)), Canon 9 and Rule 771 (now Rule 770), "the principal allegation, and the one on which the subsidiary charges depend, is that respondent violated Rule 7-110(a)" (giving or lending a thing of value to a judge). (Emphasis added.) In the case of *In Re Storment*, 203 Ill.2d 378, 397 (2002), the Illinois Supreme Court stated that violations of Rule 8.4(a)(5) and Rule 771 (now Rule 770) are "generally considered subsidiary charges, dependent on proof of other, more specific violations." These cases make clear that Rule 8.4(a)(5) is a subsidiary charge which must stand or fall on proof of the alleged professional misconduct in the principal charge. Counsel for the Administrator in her closing before the Hearing Board even admitted: "Now even if this Panel decides that 3.1 does not apply to Mr. Hess, the *Storment* case is dispositive of whether this Panel can then rely on the next two rules. Which is 8.4(a)(5) and Supreme Court Rule 770." (R. 602) As to Mr. Hess, that principal charge is a purported violation of Rule 3.1. Because a purported violation of the principal charge of Rule 3.1 in Count I and II cannot as a matter of law be applied to Mr. Hess as the client not practicing law, for the reasons stated above, there can also be no proper legal finding of a violation of Rule 8.4(a)(5) by Mr. Hess in Count I and II, and such subsidiary charges must also fall due to failure of proof on the principal charges, Rule 3.1. And still both Boards ignored the controlling holding of *Storment*, mentioned above. As a result, the Hearing and Review

Boards were legally in error in finding/upholding a violation of Rule 8.4(a)(5) in Count I and II. As a result, this Court should not impose reciprocal discipline upon Mr. Hess under Missouri Rule 5.20.

II. The Illinois Supreme Court erred in ordering discipline against Mr. Hess's license in Illinois due to the Review Board error in upholding the Hearing Board findings that the Administrator had proven by clear and convincing evidence that Mr. Hess had committed the misconduct charged against him in Count I and II of the Complaint, in violation of Rule 3.1 and 8.4(a)(5) of the Illinois Rules of Professional Conduct, because the Hearing Board had improperly made findings of fact and rendered its judgment based upon facts and misconduct, not first factually alleged in the Complaint, in violation of Mr. Hess's due process rights. As a result, the motion for reciprocal discipline against Mr. Hess's Missouri license under Missouri Rule 5.20 should be denied.

It is clear in a disciplinary proceeding in the State of Illinois that "an attorney can be tried only on the charges filed against him." *In Re Stillo*, 68 Ill.2d 49, 55 (1977). Any attempt to discipline an attorney for acts of misconduct not factually alleged in the Administrator's Complaint is violative of the attorney's due process rights. *In Re Doyle*, 144 Ill.2d 451, 471 (1991). In the Complaint before the Hearing Board, there was never any factual allegation under Rule 3.1 in either Count I or Count II that Mr. Hess (the party/client for whom Mr. Carr had

brought all legal proceedings) had "brought any legal proceeding or asserted or controverted any issue therein" for any client in any court of law. In the *Beatty* case, the Illinois Supreme Court emphasized:

> "This Court has repeatedly held that a complaint which does not allege **facts**, the existence of which are necessary to enable a plaintiff to recover **does not state a cause of action** and that **such deficiency may not be cured by liberal construction or argument.**" *In re Beatty*, supra at 500. (Emphasis added.)

The Complaint in Illinois failed to comply with the above case authority, and Mr. Hess cannot be disciplined for purported acts of professional misconduct (bringing a legal proceeding for a client) under Rule 3.1, which facts were not first alleged factually in the Complaint. On this authority alone, both Counts I and II should have been dismissed as to Mr. Hess.

The Hearing and Review Boards also repeatedly violated the rules of the Disciplinary Commission. In *In Re Beatty*, supra at 499, the Illinois Supreme Court made clear what is necessary before an attorney can be found guilty of violating its disciplinary rules, as follows:

> "The rules of the Commission require that a complaint state the **facts** of the misconduct charged and inform the lawyer of what he or she is accused. That reflects, of course, the basic law regarding the nature of a complaint which requires that it contain **a statement of facts** constituting the cause of action claimed. A complaint that does not allege **facts**, the proof of which

> are necessary to entitle a plaintiff to judgment, **fails to state a cause of action**. The complaint must contain **factual allegations of every fact** which must be proved in order for the plaintiff to be entitled to judgment on the complaint, and **a judgment cannot be rendered on facts demonstrated by evidence at trial unless those facts shown were alleged in the complaint**." (Emphasis added.)

In Count I of the Complaint, (Informant's Brief, App. 95-103), the only facts of misconduct charged were that Mr. Carr (not Mr. Hess) had filed a complaint against the Loyds, but only 2 paragraphs in a fifty (50) paragraph complaint were alleged to have no legal or factual basis upon which to state a **claim** against the Loyds. Those were not the same facts of misconduct found by the Hearing Board, when the Board determined that the **entire lawsuit** was filed without proper basis, etc. The Administrator's Complaint in Count I never alleged as fact that the **entire lawsuit** was frivolous, baseless, etc., but only that paragraphs 23 and 25 of the Loyd complaint did not state a claim against the Loyds in violation of Rule 3.1. As a result, 48 out of the 50 paragraphs in the *Hess v. Loyd* complaint had obviously been determined by counsel for the Administrator to be meritorious claims under Rule 3.1, or she would have alleged that the entire lawsuit was frivolous, but she chose not to allege such a claim. Clearly, the two paragraphs of allegedly meritless claims are not the legal equivalent of an entire lawsuit alleged to be totally without merit. As a result, the Hearing Board's judgment on Count I was improperly returned on facts of

misconduct presented at trial which were not first factually alleged in the Complaint, as mandated by the Illinois Supreme Court in *In Re Beatty,* supra. Such a fundamental legal failure to plead the factual allegations of every fact which must be proved in order for plaintiff to be entitled to judgment on the complaint, **fails to state a cause of action** and "**such deficiency may not be cured by liberal construction or argument,**" as has been argued by the Hearing and Review Boards. *In Re Beatty,* supra at 500. (Emphasis added.)

Likewise, there was no factual allegation in Count I of the Complaint that the entire lawsuit was filed to pressure attorney Ronald Kanoski to settle a claim Mr. Hess had against the Kanoski & Associates law firm. (Informant's Brief, App. 95-103) According to *Beatty*, supra, the finding of the Hearing Board (Report, p. 24) that the entire lawsuit was unwarranted and baseless cannot stand, nor can the board's finding stand that the entire lawsuit was filed against the Loyds for no purpose other than to harass and intimidate the Loyds and to pressure attorney Ronald Kanoski to settle a claim Mr. Hess had against the Kanoski & Associates law firm. (Hearing Board Report, p. 24) (Informant's Brief, App. 114-165)

Nor was there any factual allegation in Count I of the Complaint that both Mr. Carr and Mr. Hess filed the lawsuit against the Loyds while knowing it was frivolous and without any legal merit and for the purpose of harassing and burdening the Loyds because of an employment dispute with Kanoski. Consequently, the Hearing Board's finding (Report, p. 28) to that effect is improper and cannot stand according to *Beatty*, supra. The Hearing Board's

finding (Report, p. 31) that the Respondents' purpose for filing the lawsuit against the Loyds was to harass, intimidate, and burden the Loyds in order to pressure or influence Kanoski and Blan to settle Hess's claim against them, also cannot be permitted to stand, because there were no such facts alleged in Count I of the Complaint and therefore the Hearing Board finding was improperly based upon facts of misconduct not alleged in the Complaint. (Informant's Brief, App. 95-113) Also, because there were no facts alleged in Count I of the Complaint as found by the Hearing Board (Report, p. 31) that both Mr. Carr and Mr. Hess knowingly and deliberately participated in the filing of the meritless lawsuit against the Loyds, such finding by the Hearing Board violates the holding in *Beatty,* supra.

The Hearing Board (Report, p. 25) found that the evidence showed that Mr. Loyd hired the Kanoski & Associates law firm and did not hire any individual employee or associate thereof. This finding of fact is not supported by any proper allegation of fact in the Complaint, therefore according to *Beatty*, supra, cannot be a proper basis for the Hearing Board's judgment on Count I of the Complaint. Additionally, this particular finding by the Hearing Board is contrary to the law in the State of Illinois which has for years held: "It is axiomatic that the employment of a law firm is the employment of all members of that firm unless there is a special understanding otherwise." *Knight v. Guzman,* 291 Ill.App.3d 378, 382 (1st Dist. 1997) (citing to *Smith v. Brittenham*, 109 Ill. 540 (1884). Such legal principal in the *Knight* case was broad enough to include the actions of an

associate attorney of the retained law firm in that case. The *Knight* case was also cited as authority for this same legal principle by the *Thompson* appeals court in its Rule 23 Order (Administrator Exhibit # 27, p. 11), relied upon by the Hearing Board. As a matter of law therefore, when Mr. Loyd by written contract retained the Kanoski & Associates law firm, he also retained and hired Mr. Hess to represent him as an associate attorney of the Kanoski law firm. Where there is no express agreement as to the question of fees between attorney and client, it is universally recognized that there is an implied contract that the attorney be entitled to reasonable compensation measured by the value of his services." *Sullivan v. Fawver*, 58 Ill.App.2d 37, 42 (2nd Dist., 1965). (Emphasis added.) Additionally, where an express contract is not entered into, there is generally an implied promise to pay reasonable compensation for services rendered by the attorney pursuant to the theory of quantum meruit. *Greenbaum & Browne, Ltd. v. Braun*, 88 Ill.App.3d 210, 213 (1st Dist., 1980). Also, "an attorney client relationship is created when an attorney files his appearance for plaintiffs." *Warren v. Williams*, 313 Ill.App.3d 450, 453 (1st Dist., 2000). It should be noted that the Hearing and Review Boards found/upheld that Mr. Hess had filed the Complaint on behalf of the Loyds in February of 2004 in their medical malpractice case against Dr. Billiter and his group. (Hearing Board Report, p. 25; Review Board Report, p. 3) This fact alone created an attorney client relationship between Mr. Hess and both Loyds. The Hearing and Review Boards even found as a matter of fact that Mr. Hess had an attorney client relationship for years with both Loyds. (Hearing Board Report, p.

30; Review Board Report, p. 1, 17) Even Mr. Kanoski (called by counsel for the Administrator) admitted in the Hearing Board transcript that the Loyds knew that they had a contract with Kanoski & Associates which said that its associate, Mr. Hess, would be practicing law for them, and they knew this before March 13 of 2007. (R.117-118.) Based upon the above facts, admission, and case authority, Mr. Hess had an attorney client relationship with the Loyds for years before and after his wrongful firing by the law firm and was therefore legally entitled to give consent to Mr. Carr to sue the Loyds (his admitted clients by the Hearing and Review Boards) to recover fees for his legal services for them for years. The case of *The People of the State of Illinois v. Phillip Morris, Inc.*, 198 Ill.2d 87, 94 (2001) held: "Indeed, it is settled that outside of the Act (770 ILCS 5/1)(Attorney Lien Act), attorneys can still sue their clients to recover for their services." Even an attorney who has not perfected his attorney lien is still entitled to recover for his services by suing his client quantum meruit. *Stefanich, McGarry, Wols & Okrei, Ltd. v. Hoeflich*, 260 Ill.App.3d 758 (3rd Dist., 1994). Likewise, the Illinois Attorney Act, 705 ILCS 205/1, describes the legal effect of an attorney's license to practice law in the State of Illinois. That Statute provides: "A license, as provided for herein, constitutes the person receiving the same an attorney and counselor at law, according to the law and customs thereof, for and during his good behavior in the practice and authorizes him to demand and receive fees for any services which he may render as attorney and counselor at law in this state." (Emphasis added.) "A concomitant principle, established by the decisions of this court, is that the

right to practice law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue cases and **collect fees therefor**..." *In Re Anastaplo*, 3 Ill.2d 471, 475 (1954). (Emphasis added.) Accordingly, Mr. Hess's existing attorney license before the Illinois Supreme Court (2001 to October, 2012) and the above "applicable law" provided Mr. Carr with non-frivolous "good faith arguments in support of his client's positions," to include bringing a suit against Mr. Hess's clients the Loyds for Mr. Hess's years of incurred legal fees. (See Comment to Illinois Rule 3.1 at paragraph [2]. (2010)) These well recognized principles of law concerning attorney client contracts for fees, attorney liens, and actions to recover attorney fees from clients, can be easily found in the Illinois legal encyclopedias, *Nichols Illinois Civil Practice*, Volume V, Chapter 96, and in *Illinois Law and Practice*, Volume IV, Attorneys and Counselors, Section 1-29, pp. 37-273. Even another witness called by the Administrator before the hearing board, Mr. Bresney, admitted that he had been assigned by Mr. Kanoski to represent the Loyds in connection with the *Hess v Loyd* lawsuit, and although he could not recall having a written contract with the Loyds, he admitted that he still had an attorney client relationship with them, and if they did not pay his fees, the law in the State of Illinois would permit him to sue the Loyds for that fee. (R. 238-240) For all these reasons and authorities, Mr. Carr had a perfectly proper legal and factual basis and case law to support his filing the lawsuit on behalf of his client

Mr. Hess against the Loyds in order to recover Mr. Hess's attorney fees, and such a filing cannot legally have been entirely frivolous under Rule 3.1.

Likewise the Hearing Board findings (Report, p. 29), including that the Loyds did not enter into any contract or agreement or make any promise to pay any attorney fees to Mr. Hess or that Mr. Hess did not enter into a contingent fee agreement or any other fee agreement with the Loyds, are more factual findings which were never alleged as fact in Count I of the Complaint and therefore ran afoul of the factual pleading requirements in the *Beatty* case, supra. Additionally, these findings are also contrary to the case and other authority mentioned above, which clearly provide that no written fee agreement is required between an attorney and his client for there to be an attorney client relationship between them. It is the attorney client relationship which then permits the attorney to sue his client to recover fees for his legal services. See *Phillip Morris*, *In Re Anastaplo,* and the Illinois Attorney Act, 705 ILCS 205/1, supra.

For these same reasons, the Hearing Board's findings (Report, pp. 30-31) as to the untimely perfection/enforcement of Mr. Hess's legally created attorney liens and that Mr. Hess allegedly knew that he did not represent the Loyds after March of 2007, are both findings of fact which were not in any fashion alleged in the Complaint, and therefore such findings of fact cannot be used as a basis for the judgment rendered by the Hearing Board under Count I of the Complaint, according to *Beatty,* supra. Additionally, the findings of the Hearing Board (Report, p. 31) that the Respondents' purpose for filing the lawsuit against the

Loyds was to harass, intimidate and burden the Loyds in order to pressure or influence Kanoski and Blan to settle Hess's claim against them runs afoul of the mandate in the *Beatty* opinion, because Count I of the Complaint never alleged that the entire lawsuit was brought to harass, intimidate and burden the Loyds and pressure Kanoski and Blan to settle the claim against them. Likewise, the finding at page 31 that both Mr. Carr and Mr. Hess knowingly and deliberately filed the meritless lawsuit against the Loyds is in violation of the holding in *Beatty*, supra, because there is no factual allegation in Count I of the Complaint that Mr. Carr or Mr. Hess knowingly and deliberately filed a meritless lawsuit. Also, there was no evidence presented to the Hearing Board from any witnesses or exhibits that Mr. Hess's purpose was meant to harass the Loyds or pressure Mr. Kanoski and Mr. Blan to settle. (Hearing Board Report, pp. 3-44)

The Hearing Board violated the holding in the *Beatty* case, supra, when it found (Report, p. 33) that the Administrator had proved by clear and convincing evidence that Mr. Hess committed the misconduct charged in Count I that he "brought a proceeding, or asserted or controverted an issue therein", etc. As mentioned above, there is no factual allegation in Count I of the Complaint that Mr. Hess brought any legal proceeding into a court of law nor did he assert or controvert an issue in any legal proceeding in a court of law. The Hearing Board, therefore, cannot return a finding based upon facts which were not first alleged in the Complaint.

The Hearing Board's finding (Report, p. 34) that Count II of the Complaint (Informant's Brief, App. 104-107) alleges that Mr. Carr served notices of meritless attorney liens in the Loyd, Eller, and Thompson cases is legally improper. Count II of the Administrator's Complaint never alleged as fact that any of the three statutory attorney liens served were meritless, or even frivolous. Count II of the Complaint merely alleged factually that the lien notices were filed against the law firm (factually incorrect) and the underlying defendants and eventually the liens were stricken by the trial courts. (Informant's Brief, App. 104-107) As proven facts at the Hearing Board, none of the three trial judges who struck Mr. Carr's lien notices ruled any lien claim was meritless, baseless, or frivolous. (Administrator Exhibits 14, 21, 22) Neither did any of those three trial judges make a report of attorney misconduct to the ARDC in connection with the serving or arguing of Mr. Carr's lien notices, even though "a trial court has a duty to report attorney misconduct to the ARDC". *Richardson v. Haddon*, 375 Ill.App.3d 312, 316 (1st District, 2007) There was no evidence before the Hearing Board that the client Mr. Hess served or argued any lien notices at any court hearings. None of the six appellate judges ruled that Mr. Carr's pursuit of attorney liens in favor of Mr. Hess at the trial level was meritless, baseless, or frivolous. (Administrator's Exhibit 27, 31) These uncontradicted facts were completely ignored by the Hearing Board. In fact, the Fourth and Fifth District Courts of Appeal had ruled that there was an attorney client relationship between Mr. Hess and his clients and that there was a statutory attorney lien created in both cases (Loyds and

Thompson), but that his attorney client relationships did not last long enough (due to his firing by Mr. Kanoski) for his legally valid attorney liens to be later perfected (made enforceable or recoverable) under the Illinois attorney lien statute. (Administrator's Exhibit 27, 31) These facts proven at the Hearing Board are hardly clear and convincing evidence that the three lien claims were legally frivolous under Rule 3.1. Apparently the medical malpractice defense attorneys did not perceive Mr. Hess's lien in the *Loyd v Billiter* case to be frivolous, because the Record (C 704) (Informant's Brief, p. 14) shows that they deposited into the circuit court $330,625.00 in attorney's fees from the Loyd settlement, in connection with that attorney lien claim. This Hearing Board finding was also contrary to the case law, existing at the time the attorney lien notices were served by Mr. Carr, which held that the only way that an attorney client relationship could be legally terminated would be upon: (1) the death of the attorney or the client, (2) the firing by one of the other, or (3) the matter on which the attorney client relationship was created had since been concluded. The relationship between an attorney and his/her client cannot be terminated by a third party. See *Illinois Law and Practice*, Volume IV, Section 70-73, pp. 161-169. None of these three terminating events had occurred at the time Mr. Carr served the lien notices upon the underlying defendants on behalf of his client Mr. Hess. A subsequent firing by an attorney's employer (Kanoski & Associates) is not a valid legal reason for that attorney's prior attorney client relationship(s) to end, and there is apparently no reported opinion in the State of Illinois which so holds. An attorney client

relationship does not admit to intermediaries between attorney and client. *Greer v. Ludwick*, 100 Ill.App.2d 27, 39 (5th Dist., 1968).

The Hearing Board improperly found (Report, p. 37) that the evidence clearly and convincingly established that Mr. Carr and Mr. Hess served notices of an attorney's lien in the Loyd, Eller, and Thompson cases, even though they knew there was no legal basis for doing so and for the purpose of harassing, intimidating and burdening those individuals. The evidence at the hearing board actually proved Mr. Hess as the client did not serve any lien notices. The Review Board noted Mr. Carr served the notices of the attorney liens at p. 1 of the Review Board report. The Hearing Board also found that Mr. Carr and Mr. Hess sought to use the liens to pressure or influence Mr. Kanoski and Mr. Blan to settle Mr. Hess's claims against them in a separate dispute. However, there was no evidence presented at the Hearing Board in support of its finding that Mr. Hess was improperly using the liens to pressure or influence Mr. Kanoski or Mr. Blan. (Hearing Board Report, pp. 3-23) (Administrator's Exhibit 1-15, 20-23, 25, 29, 36-40) The Hearing Board also found that none of Mr. Hess's clients entered into a representation agreement with Mr. Hess and none of them agreed to pay any compensation to Mr. Hess. All of these factual findings by the Hearing Board were unsupported by any alleged facts contained in Count II of the Complaint, and therefore the board's judgment cannot be rendered on such facts which had not been first alleged in the Complaint. See *Beatty*, supra. Additionally, there was absolutely no evidence presented from Mrs. Eller or Mr. Thompson at the Hearing

Board concerning attorney lien notices served in their lawsuits. Mrs. Eller and Mr. Thompson did not testify at the hearing (Hearing Board Report, pp. 3-23) and no other evidence was presented to the Hearing Board that in any way supported the Board's findings that the Eller and Thompson liens were used to harass and intimidate them or to influence Kanoski or Blan to settle a separate dispute, or that either Mrs. Eller or Mr. Thompson had suffered any damage/injury because of the lien notices or court hearings on same. (Hearing Board Report, pp. 3-23) (Administrator Exhibits, 1-15, 20-23, 25, 29, 36-40) In the total absence of any evidence to support such findings, those findings by the Hearing Board as to the Eller and Thompson liens cannot be a legal basis for the Hearing Board's judgment on Count II of the Complaint.

The Hearing Board findings (Report, p. 38) that the Loyds, Mrs. Eller, Mr. Thompson did not hire Mr. Hess but only Kanoski & Associates are findings of fact which were not first alleged as fact in Count II of the Complaint and can therefore not be a valid legal basis for its judgment rendered against Mr. Hess. See *Beatty* case, supra.

The Hearing Board's finding (Report, p. 39) that the Loyds, Eller, and Thompson had placed their claims in the hands of Kanoski & Associates and not Mr. Hess is a finding of fact which was not first alleged in Count II of the Complaint and is therefore an improper basis for a judgment against Mr. Hess. See *Beatty* case, supra. Nevertheless, 770 ILCS 5/1 at section 1, (Illinois Statutory Attorney Lien Statute) provides that not only are statutory attorney liens created in

favor of attorneys when claims/suits "may be placed in their hands by their clients for suit or collection," but the statute also provides that attorney liens are created when the attorney provides legal services in a case "upon which suit or action has been instituted," and the statutory lien amount is any fee agreed upon between the attorney and the client or "in the absence of such agreement, for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses." The facts presented at the Hearing Board (and admitted in the Review Board Report, p. 1) were that the three cases in question were assigned to Mr. Hess for his representation of the clients early on by Mr. Kanoski on behalf of Kanoski and Associates. The assignment of those cases to Mr. Hess, coupled with his extensive legal work for years for said clients (Review Board Report, pp. 3-4) created proper attorney liens which Mr. Carr could legally serve and argue his lien notices, based on the law existing at the time of service of his lien notices.

The Hearing Board's finding (Report, pp. 39-40) that Mr. Hess's own testimony showed that he was in no position and did not want to represent the Loyds after March of 2007 is a finding of fact which was not first alleged in the Complaint, and such finding of fact cannot be a basis for a judgment against him, pursuant to *Beatty*, supra. Additionally, the Hearing Board ignored the holding in the appellate court decision on the Loyds attorney lien, that there had been an attorney client relationship created between the Loyds and Mr. Hess, at least up to the time of his firing by Mr. Kanoski. (Administator's Ex. 31, p. 4) Also, the finding at p. 40 of the Report that Mr. Hess decided not to represent the Loyds in

2008 or that his decision not to maintain his Illinois license in active status demonstrated he did not want and did not have any clients in Illinois and that Mr. Hess consciously decided not to represent the Loyds, Eller, Thompson, or anyone else in Illinois were not first factually alleged in the Complaint, and therefore are not a proper basis for the judgment against Mr. Hess per *Beatty*, supra. The finding by the Board at p. 40 that both Mr. Carr and Mr. Hess actively participated in serving the notices of attorney liens and filing the notices with the circuit courts, while knowing that the attorney liens were without merit and invalid, is also a set of facts which were not first alleged in the Complaint and violate the holding in *Beatty*, *supra*. And no evidence was presented at the Hearing Board in support of such a finding of Mr. Hess serving or filing any lien notices. There was no allegation nor clear or convincing proof that Mr. Carr or Mr. Hess knew at the time Mr. Carr served the notices that they were legally meritless. (Hearing Board Report, pp. 3-23) Mr. Hess testified that he did not know of his lien rights when he hired Mr. Carr, who had researched the law and advised Mr. Hess that he had lien recoveries. (R. 421) It was not possible with such uncontradicted testimony, for Mr. Hess to know as a fact that the lien notices Mr. Carr was serving were purportedly meritless.

The Hearing Board's finding (Report, p. 40) that the Administrator had proved by clear and convincing evidence that Mr. Hess committed the following misconduct charged in Count II, specifically that he: "brought a proceeding, or asserted or controverted an issue therein" is also a factual finding which was not

first alleged as fact in the Complaint, and therefore violates *Beatty*, supra. Mr. Hess's admitted attorney client relationships, as mentioned previously, provided Mr. Carr, as Mr. Hess's attorney, with a reasonable legal and factual basis to conclude that Mr. Carr could properly serve the lien notices in the Loyds, Eller and Thompson cases under 770 ILCS 5/1 and that such lawful actions would not be deemed completely frivolous under Rule 3.1. Certainly the nine trial and appellate judges in their lien matter orders never held such lien actions brought before the trial courts were frivolous. (Hearing Board Report, pp. 3-23; 34-41) (Administrator Exhibits 14 (1/26/09); 21 (4/16/09); 22 (5/5/09))

Additional errors committed by the Review Board in its Report, perhaps due to the fact that Board member Anna Loftus (who wrote the Report of the Review Board) completely missed oral arguments before the Review Board, also need to be addressed. The Review Board listed several portions of Mr. Hess's employment agreement with Kanoski & Associates. (Review Board Report, pp. 2-3) The referenced sections of Mr. Hess's employment contract cannot control in this matter, because Mr. Kanoski had admitted before the Hearing Board that he had breached Mr. Hess's employment contract with Kanoski & Associates when he terminated Mr. Hess. (R. 86, 105, 133, 142-143) At the time Mr. Kanoski fired Mr. Hess, and also breached his employment contract, said contract thereafter was no longer any purported legal impediment to Mr. Hess later suing his admitted clients (the Loyds) for his years of legal work and legal fees.

> "When a contract is terminated, even wrongfully, there is no longer a contract -"no contract" – no duty to perform and no right to demand performance.... There is only a right to seek and a duty to pay damages caused by the termination." *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Circuit, 1996)

The Review Board also mistakenly claimed that Mrs. Loyd had entered into a contingency fee agreement with Kanoski & Associates (Report, p. 3) and further that she had signed an agreement to stay with Kanoski & Associates and have Mr. Blan represent her in March of 2007. (Report, p. 4) The copy of the contract that Mr. Loyd signed with Kanoski & Associates, and the Blan contract (App. 6; 7-8) both clearly show that Mrs. Loyd did not sign a contract with Kanoski & Associates or with the Blan Law Offices. The Administrator's counsel before the Hearing Board even stipulated that Mrs. Loyd never signed any attorney client contracts. (R. 210-212) The Review Board also overlooked the fact that all of the law firm contingency contracts were not signed by Mr. Kanoski on behalf of Kanoski & Associates before Mr. Hess had started working on the clients' cases, and thereby Mr. Hess had already created an attorney client relationship with his clients. (R. 392-393) Mrs. Loyd never signed any contract with the Kanoski law firm, and consequently she never hired the Kanoski law firm. At the same time, the evidence before the Hearing Board resulted in a Hearing Board finding that Mr. Hess performed almost all, if not all of the work on the lawsuit he filed for Mr. and Mrs. Loyd. (Hearing Board Report, p. 25) As a result, the only attorney

with any attorney client relationship with both of the Loyds (before his firing) was Mr. Hess. According to the *Philip Morris* case, supra, Mr. Carr, on behalf of Mr. Hess, was legally entitled to sue the Loyds to recover Mr. Hess's attorney fees for their refusal to pay for his legal services in an attorney client relationship from 2002 to 2007. Based upon these uncontradicted facts at the Hearing Board, the entire lawsuit brought by Mr. Carr against the Loyds was not shown by clear and convincing evidence to have as its sole motive and intent to harass the Loyds, and as a result the entire lawsuit against the Loyds was not frivolous or meritless under Illinois Rule 3.1.

The Review Board (Report p. 6) improperly referenced a comment by one of the appellate justices in the *Thompson* case during oral argument on appeal. Such comment did not appear anywhere in the appellate court Rule 23 Order (Administrator's Exhibit 27) and is therefore not a relevant or precedential part of the final appellate court opinion. Likewise, the comment made during oral argument was not pled as a fact in the Administrator's Complaint, and according to the *Beatty* opinion, cannot be used as a basis for a disciplinary judgment against Mr. Carr or Mr. Hess.

The Review Board incorrectly stated (Report, p. 6) that Mr. Hess in his three conversations with Mr. Carr about filing suit against his clients, the Loyds, had discussed the theories of liability against them. Such statement is not supported by the Record before the Hearing Board. The transcript before the Hearing Board clearly shows that Mr. Hess only had three conversations with Mr.

Carr about Mr. Carr's recommendation to sue the Loyds. (R. 399) In the first two conversations, Mr. Hess refused to give permission to Mr. Carr to sue the Loyds for their breach of contract, unjust enrichment, etc. It was only during the third conversation that Mr. Hess ultimately consented to Mr. Carr bringing a lawsuit against the Loyds, when Mr. Carr advised Mr. Hess that the lien action judge had indicated to Mr. Carr that he would just have to bring a lawsuit against Mr. Hess's clients, the Loyds. (R. 339; 399-400) That same trial judge who had attempted to settle the Loyd lien did not complain to Mr. Carr that the lien action was frivolous or meritless. (R. 399-400) Far from clear and convincing proof of either man's purported frivolous purpose to harass or intimidate, or gain an advantage against other parties. Mr. Hess testified he had never done a breach of contract action and that is why he came to The Rex Carr Law Firm (R. 414, 415), he did not approve the contents of the complaint before it was filed (R. 409), he never actually read the complaint before Mr. Carr filed it in court (R. 403, 407, 409), Mr. Hess relied on his attorney's ability and followed his advice at all times (R. 448), and Mr. Hess merely told Mr. Carr to do what he felt was appropriate and left it in Mr. Carr's hands (R. 400, 401). All of this testimony by Mr. Hess was completely uncontradicted at the Hearing Board. Besides, a purported discussion of the theories of liability related to the complaint against the Loyds, was not pled as fact in the Administrator's Complaint, and also there was no allegation in the Administrator's Complaint that Mr. Carr or Mr. Hess had filed the entire complaint against the Loyds with an intent to harass or intimidate them and/or to

gain an advantage against other parties, such that these unpled facts violate the holding in *Beatty*, supra.

The Review Board incorrectly stated (Report, p. 9) that Mr. Hess argued that the Hearing Board's findings of misconduct were contrary to the manifest weight of the evidence. Mr. Hess actually argued that the findings of the Hearing Board were contrary to the established law and were therefore legally improper. Additionally, the Review Board (Report, p. 9) apparently applied an improper definition of the term "clear and convincing evidence," when it concluded that all that needs to be found is a probability that a proposition at issue is true. (See Hearing Board Report, p. 23) In contrast, "clear and convincing evidence" has been defined by the Illinois Supreme Court as follows:

> Clear and convincing evidence most often has been defined "as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question. Although stated in terms of reasonable doubt, courts consider clear and convincing evidence to be more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense." *Bazydlo v. Volant*, 164 Ill.2d 307, 213 (1995)

The Review Board's conclusion (Report, p. 12) that there was not a contract between Mr. Hess and the Loyds has been previously addressed above. Mr. Kanoski admitted during the Hearing Board testimony that the law firm contingent contract with Mr. Loyd included Mr. Hess's representation of Mr.

Loyd. (R. 95, 102-103, 117-118) Also as stated above, Mrs. Loyd had no written contract with the law firm, but had an attorney client relationship for years with Mr. Hess, (Hearing Board Report, p. 5) and therefore, a written contract was not needed for Mr. Hess to seek to recover attorney's fees from her as his client. The finding that there was allegedly no contract between Mr. Hess and the Loyds is a fact which was never alleged in the Administrator's Complaint and therefore violates *Beatty*, supra. The statement of the Review Board (p. 12) that there had not been a perfected notice of attorney lien that could support Mr. Hess's lien claim, are facts which were also not alleged in the Administrator's Complaint and violate the holding in *Beatty*, supra.

The Review Board's statement (Report, p. 14) that Mr. Hess's lawsuit against the Loyds was meritless and that Mr. Hess knowingly and deliberately participated in its filing is also a statement of facts which were not first alleged in the Administrator's Complaint, and are therefore in violation of *Beatty*, supra. Besides, Mr. Hess did nothing different in hiring a lawyer to bring his legal actions against his clients, than Mr. Greenblatt did in the *Greenblatt* case, supra. Mr. Greenblatt certainly participated in the decision to have his attorneys file suit against his client, and yet he was ultimately cleared of any alleged violations of Rule 3.1 and 8.4(a)(5), because Rule 3.1 does not as a matter of law apply to a client in a legal proceeding, and the *Greenblatt* authority also applies to Mr. Hess as a party/client. Additionally, the Review Board (Report, p. 14) mistakenly relied upon the wrong standard when it concluded that the finding that Mr. Hess violated

Rule 3.1 was not contrary to the manifest weight of the evidence. Whether or not Illinois Rule of Professional Conduct 3.1 can be legally applied to a client as opposed to a lawyer bringing a legal proceeding for his or her client is a question of law, and not a question of the weight of the evidence before the Hearing Board. "Although the factual findings of the Board are generally entitled to deference, it is this court's duty to determine whether the respondent's actions amounted to a violation of the Code." *In Re Discipio*, 163 Ill.2d 515, 527 (1995)

The Review Board was incorrect in stating (Report, p. 15) that Mr. Carr and Mr. Hess served the notices of attorney liens in the Loyd, Eller, and Thompson matters. As has been mentioned previously, the Review Board repeatedly indicated that Mr. Carr served on behalf of Mr. Hess the lien notices as to the clients of Mr. Hess. (Report, p. 1)

The Review Board (Report, p. 16-17) made reference to purported facts (the placement of claims into Mr. Hess's hands) (Mr. Hess's attorney client relationships with his clients did not continue until May of 2008) (Mr. Hess could not perfect any attorney liens in the three matters) (Mr. Hess's representation of said clients ended when he left Kanoski & Associates) (Mr. Hess and Mr. Carr had used the lien in the Loyd matter to pressure Mr. Kanoski and Mr. Blan into paying Mr. Hess a portion of the Loyd attorney fees), but those purported facts were not factually alleged in the Complaint and are therefore in violation of the holding of *Beatty*, supra. Also, the Review Board (Report, p. 16-17) confused the legal requirement that a notice of an attorney lien must be served during the attorney

client relationship with the finding of the Hearing Board that Mr. Hess was not engaged in an active representation of the Loyds, Eller, or Thompson, after he was wrongfully fired from the Kanoski law firm in February of 2007. As has been mentioned previously, the Hearing Board in fact found that there had been an attorney client relationship existing for years between the above mentioned clients and Mr. Hess. The fact that he was later denied the opportunity to continue to represent his clients further, by Mr. Kanoski, and his breach of contract firing of Mr. Hess from the Kanoski & Associates law firm, did not legally terminate Mr. Hess's admittedly existing attorney client relationships with his clients. As a matter of law, as has been argued above, Mr. Hess's admitted attorney client relationships with these clients continued after his firing, because his employer cannot legally terminate Mr. Hess's attorney client relationships with his clients. There was no evidence presented to the Hearing Board, nor did the Hearing Board find that any of the clients in question actually fired Mr. Hess as their attorney who had an attorney client relationship with them. (Hearing Board Report, pp. 3-44) Besides, if the client terminates the attorney client relationship, the client must notify the adverse party and the court of his or her action. *Cook County v. Schroder*, 55 Ill.App.2d 449, 462 (1st Dist. 1964) (Emphasis added) There was no evidence presented before the Hearing Board that any of Mr. Hess's clients ever notified the adverse party and court in their cases that Mr. Hess was no longer their attorney. (Hearing Board Report, pp. 3-44) All of the uncontradicted evidence before the Hearing Board was that at all times Mr. Hess remained the

attorney of record in the Loyd, Eller, and Thompson cases, as was pointed out by Mr. Green in his dissent to the Report of the Review Board (Loyds). (Review Board Report, p. 22) The chairwoman of the Hearing Board even admitted that Mr. Hess was the attorney of record for the Loyds. (R. 196) Likewise, the record is clear, as admitted by the Review Board, that Mr. Blan only entered his appearance in the Loyd case as an additional counsel for the plaintiff, and not as a substitute counsel for plaintiff. (Review Board Report, p. 4) Counsel for the Administrator before the Review Board at page 40 of his brief admitted that neither the Loyds, Eller, or Thompson had discharged Mr. Hess at any time during the relevant portions of those underlying legal matters. As a result, the case of *Paul v. Neely*, 155 Ill.App.3d 241, 244 (4th District 1987) controls, and that case clearly holds that an attorney can file his notice of attorney lien at any time after the attorney client relationship is created "and before his discharge by his **client**." (Emphasis added.) (Note this case does not state: "before the attorney is fired by his **employer**.") The *Paul* case proves that Mr. Carr's service of the lien notice in the three lawsuits Mr. Hess years prior had filed for his clients cannot be frivolous as a matter of law pursuant to paragraph [1] in the Comment Section of Rule 3.1 (2010), which states: "The law, both procedural and substantive, establishes the limits within which an advocate may proceed." Also, Mr. Carr's actions in serving the lien notices on behalf of his client, Mr. Hess, must be judged by the facts and circumstances known to Mr. Carr at the time the lien notices were

served, as opposed to an event years later. The Preamble to the Illinois Rules of Professional Conduct, at paragraph [19] clearly states:

> "The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation." (2010)

The Review Board (Report, p. 16) was in error in stating that Mr. Hess's law license was permitted to lapse in January of 2008. Mr. Hess testified he had merely asked for his license to become inactive for economic reasons after his firing, and it was again made active by Mr. Hess in October of 2008. (Review Board Report, p. 5; R. 398-399)

The Review Board noted (Report, p. 7) that the circuit court dismissed in December of 2008 the complaint that Mr. Carr had filed against the Loyds. The circuit court incorrectly decided "facts" in that case, when the motion to dismiss had only been filed pursuant to 735 ILCS 5/2-615, which statute merely allows the court to rule upon any alleged pleading defects in the complaint. This is not a statute in Illinois for a summary judgment motion. No evidentiary hearing was held before the circuit court at the time of the hearing on the motion to dismiss the complaint, and therefore the circuit court had no proper evidence before it to rule: (a) that the Loyds had no contract with Mr. Hess, (b) the Loyds retained the law firm and not Mr. Hess, (c) that there was no legal basis for a claim against the

Loyds, or (d) that the complaint was brought to harass the Loyds and gain an advantage against other parties. Such findings of fact are not the proper purpose of a motion to dismiss under 735 ILCS 5/2-615. Obviously, the circuit court had not been presented at that hearing with the later evidence presented to the Hearing Board, which conclusively proved that Mrs. Loyd never signed any contract with Kanoski & Associates, and she only had an attorney client relationship with Mr. Hess, at least through the date of his firing in February of 2007. As has been admitted above, the Loyds always had an attorney client relationship with Mr. Hess, and therefore according to the case authority mentioned above, Mr. Carr had a proper legal and factual basis for bringing a lawsuit against the Loyds for their breach of contract in failing to pay the attorney fees of Mr. Hess for his years of legal services for them under an attorney client relationship with them. The finding of an attorney client relationship between Mr. Hess and the Loyds by the Hearing Board, was in direct contrast to the "facts" found by the circuit court in December 2008, and the Hearing Board committed error in not following the actual facts found at the Hearing Board (attorney client relationship), which legally permitted Mr. Carr to sue the clients to collect the attorney fees of Mr. Hess. Based upon the evidence presented to the Hearing Board, in retrospect, the circuit court had improperly dismissed the lawsuit against the Loyds in December of 2008. Additionally, the Review Board was also incorrect (Report, pp. 7, 11) in concluding that the circuit court judgment on the pleadings in December of 2008 had been affirmed by the Fifth District Court of Appeals in the case of *Loyd v.*

Billiter, No. 5-09-0065 (October 15, 2010). That Appellate Court Rule 23 Order merely addressed the attorney lien claim in the underlying *Loyd v. Billiter* medical malpractice lawsuit, and did not pertain to the dismissal by the circuit court of the *Hess v. Loyd* lawsuit. No Appellate Court ruling had been handed down in the *Hess v. Loyd* lawsuit through the end of the hearing before the Hearing Board.

On the subject of due process, the Review Board (Report, pp. 10-11) claimed that notice of the allegations against an attorney and the fair opportunity to defend against those allegations is all that is required to comply with due process in a disciplinary matter. The case cited by the Review Board, *In Re Chandler*, 161 Ill.2d 459, 470 (1994), does not actually come to the same conclusion. The *Chandler* opinion actually held that the complaint in a disciplinary matter must inform the attorney of the "acts of misconduct he is alleged to have committed." *Chandler*, at 470. (Emphasis added.) A year later, the Illinois Supreme Court expanded upon what it meant in the *Chandler* case, with its holding in *In Re Smith*, 168 Ill.2d 269, 289-290 (1995). The Illinois Supreme Court made clear in the *Smith* case, that the notice requirement for a disciplinary action in the State of Illinois is actually a requirement that the complaint allege facts, the proof of which are necessary to entitle the plaintiff (Administrator) to judgment on the complaint and the judgment cannot be rendered on facts demonstrated by evidence at trial, unless those facts shown were first alleged in the complaint, while citing to the Illinois Supreme Court's *Beatty*

opinion, supra. The *Beatty* case made clear what is necessary before an attorney can be found guilty of violating this Court's disciplinary Rules:

> "The rules of the Commission require that a complaint state the **facts** of the misconduct charged and inform the lawyer of what he or she is accused. That reflects, of course, the basic law regarding the nature of a complaint which requires that it contain **a statement of facts** constituting the cause of action claimed. A complaint that does not allege **facts**, the proof of which are necessary to entitle a plaintiff to judgment, **fails to state a cause of action**. The complaint must contain **factual allegations of every fact** which must be proved in order for the plaintiff to be entitled to judgment on the complaint, and **a judgment cannot be rendered on facts demonstrated by evidence at trial unless those facts shown were alleged in the complaint**." *Beatty* at 499 (Emphasis added.)
>
> "This Court has repeatedly held that a complaint which does not allege facts, the existence of which are necessary to enable a plaintiff to recover does not state a cause of action and that such deficiency may not be cured by liberal construction or argument." *In re Beatty*, supra at 500. (Emphasis added.)
>
> A similar holding appears in the opinion of *In Re Doyle*, supra at 470-471.

The Illinois Supreme Court held in *Doyle* that the facts of the attorney's activities which constituted professional misconduct must be factually alleged in the complaint. In the Complaint before the Hearing Board, the Administrator never

alleged as fact that the attorney activities which constituted misconduct were Mr. Carr's filing of the entire lawsuit which was purportedly frivolous under Rule 3.1. The only factual allegations which referenced purported attorney activities of misconduct were the two claims contained in paragraphs 23 and 25 of the fifty paragraph Loyd Complaint. As a result, the Administrator has completely failed to comply with the necessary pleading requirement of the above mentioned cases, and that deficiency may not at the Hearing or Review Boards "be cured by any liberal construction or argument." The arguments of Mr. Carr and Mr. Hess as to violations of their due process rights are not "technical in nature" as claimed by the Review Board (Report, p. 10). What the Administrator is required to do is plead the facts of the acts of misconduct by the attorneys, and if the Administrator fails to do so, his complaint fails to state a cause of action, and such deficiency may not be cured by liberal construction or argument. See *Beatty*, supra. Neither were there any factual allegations in the Complaint that the Loyds were harmed in any fashion by Mr. Carr's filing of the entire complaint, as opposed to merely two paragraphs of a fifty paragraph complaint. As to Count II of the Complaint, there were no factual allegations that Mr. Carr by serving any lien notices committed an act of misconduct which was frivolous under Rule 3.1. Count II merely alleged that the lien notices were served and the liens were subsequently stricken by the three trial courts and upheld by six Appellate Court judges. None of those nine judges actually found or held that any of the lien actions in the trial courts were in

any way frivolous. (Hearing Board Report, pp. 3-23, 34-41) (Administrator Exhibits 14, 21, 22)

It must be remembered that one, against whom a disciplinary proceeding is brought, is presumed to be innocent until proved guilty. *In Re Again*, 45 Ill.2d 126,131 (1970). Any attempt to discipline an attorney for his or her activities of misconduct not factually alleged in the Administrator's Complaint is violative of the attorney's due process rights. *In Re Doyle*, at 470-471, supra. Because the Illinois Administrator failed to properly plead or prove before the Hearing Board any violation by client Hess of Rules 3.1 and 8.4(a)(5) in Counts I and II of the Complaint, and the Hearing Board improperly made findings of fact and rendered its judgment based upon facts and misconduct, which were not first factually alleged in the Complaint, in violation of Mr. Hess's due process rights, all charges against Mr. Hess in Illinois should have been dismissed by the Illinois Supreme Court. Still the Illinois Supreme Court did not approve or confirm the Review Board Report in the Illinois disciplinary order against Mr. Hess (App. 1), and there was no briefing or oral argument permitted before the Illinois Supreme Court, nor did that Court issue any opinion in said disciplinary matter.

(Response to Informant's Point Relied On)

(Standard of Review)

Before responding to Disciplinary Counsel's single point relied on in her Brief, it is important to note the appropriate Standard of Review before this Court in this matter brought pursuant to Supreme Court Rule 5.20. The standard of

review is found in the case of *In re Wiles*, 107 S.W.3d 228, 229 (Mo. banc 2003), a reciprocal discipline proceeding where this court held:

> "In matters of attorney discipline, this Court reviews the evidence *de novo* and reaches its own conclusions of law."

The single Point Relied On submitted by disciplinary counsel can be summarized as a claim that Mr. Hess's Missouri license should be disciplined under Missouri Supreme Court Rule 5.20 merely because his Illinois license was disciplined by the Illinois Supreme Court for violation of rules which are similar in Illinois and Missouri. Such an argument fails to recognize that for Rule 5.20 to have any application in this matter, there must first have been professional misconduct in another jurisdiction. As has been argued above in this Brief, Mr. Hess as the client did not commit any professional misconduct in the judicial proceedings addressed in the Illinois disciplinary action. In the absence of any such professional misconduct, there is no legal basis for Rule 5.20 to be used to discipline Mr. Hess in Missouri on a reciprocal basis. The Illinois Supreme Court declined to approve and confirm the report and recommendation of the Illinois Review Board as to Mr. Hess. The Illinois Supreme Court also declined to affirm the Hearing Board's findings as recommended by the Illinois Review Board at page 21 of its report and recommendation to the Illinois Supreme Court. (Informant's Brief, App. 2-34) The Hearing and Review Boards in Illinois are merely administrative boards which assist the Illinois Supreme Court in providing hearings and reviews of disciplinary matters pending before the Illinois Supreme

Court. Such administrative boards are not courts of law. The Hearing and Review Boards do not issue legal opinions or decisions, and are only authorized to issue reports and recommendations to the Illinois Supreme Court in disciplinary matters. In contrast to the disciplinary action against Mr. Hess, in the case of *In Re* Storment, 873 S.W.2d 227, 229 (Mo. banc 1994), the Illinois Supreme Court in that disciplinary action had approved the Hearing Board's Report and Recommendation, which approval provided the foundation for the Missouri disciplinary counsel to seek reciprocal discipline under Rule 5.19 (now 5.20). Likewise, in *In Re Weiner*, 530 S.W.2d 222, 224 (Mo. banc 1975), another case of reciprocal discipline under Rule 5.19 (now 5.20), the Ohio Supreme Court had actually affirmed the findings of the disciplinary board below, leading to the reciprocal disciplinary action in Missouri.

Counsel is mistaken at page 27 of her Brief that the Illinois Supreme Court's disciplinary orders approve and confirm a Review Board report only when the court has previously granted a party's Petition for Leave to File Exceptions to the Review Board Report. In the case of *In Re: Greenblatt*, supra, the Illinois Supreme Court denied the Petition of the Administrator for leave to file exceptions to the report and recommendation of the Review Board in that case. Although the Illinois Supreme Court did not grant the Petition for Leave to File Exceptions, still it "approved and confirmed" the report and recommendation of the Review Board in the *Greenblatt* case. (App. 2) In the case of *In Re Storment*, 873 S.W. 227, 229 (Mo. banc 1994), a case of reciprocal discipline, the Illinois Supreme Court had

also approved the Hearing Board's Report, after no party had been granted a Petition for Leave to File Exceptions to the Board's report and recommendation.

Counsel then argues at pages 27-32 of her Brief that Mr. Hess can be sanctioned for violations of Missouri Rules 4-31 and 4-8.4(d) even though counsel has repeatedly admitted that Mr. Hess was the client in the purported frivolous litigation. Such an argument is incorrect because the disciplinary matter before this Court is not a claim that Mr. Hess had violated any Rules of Professional Conduct in Missouri, but a request for reciprocal discipline under Rule 5.20 in Missouri, due to the Illinois Disciplinary Order. Missouri's disciplinary Rule 4-8.5(b), entitled "Disciplinary Authority; Choice of Law", states as follows:

> "In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise."

This rule provides that the only Rules of Professional Conduct to be applied in this Missouri reciprocal discipline action are the Rules of Professional Conduct in Illinois. This Court's focus in a Rule 5.20 action should be on whether or not as a matter of fact and law Mr. Hess as a party/client violated any professional rules of conduct in Illinois. Mr. Hess has not been charged by the Informant with any violations of the Missouri Rules of Professional Conduct, and therefore counsel

cannot legitimately argue Mr. Hess should be sanctioned for violating Missouri rules of professional conduct.

Counsel's reference to four cases appearing at page 29-30 of her Brief all concern actions for professional misconduct because of prior criminal convictions of the respondent attorneys. These cases are not relevant to this action, because Mr. Hess has not been charged with a criminal offense in the Illinois disciplinary action or in the action before this Court.

Disciplinary Counsel argues at page 30-31 of her Brief that the *Greenblatt* decision by the Illinois Review Board, later approved and confirmed by the Illinois Supreme Court in 1994, is not persuasive case authority in this matter. She fails to recognize, however, that the *Greenblatt* case, 92 CH 269, M.R. 10357 (1994) remains the controlling case authority in the state of Illinois on the subject of the non-applicability of Rule 3.1 to attorney/clients in judicial proceedings. The Illinois Supreme Court had the opportunity to overrule the *Greenblatt* case in Mr. Hess's disciplinary matter in Illinois, but the Illinois Supreme Court chose not to change the existing law as set forth in the *Greenblatt* case, supra.

At pp. 32-35 of Disciplinary Counsel's Brief, she argues that Mr. Hess's due process rights arguments "have been fully vetted and found to be lacking" in the Illinois disciplinary proceeding and before the United States Supreme Court. To the contrary, because the Illinois Supreme Court denied Mr. Hess's Petition for Leave to File Exceptions to the Review Board Report, the Illinois Supreme Court never actually reviewed Mr. Hess's Exceptions to the Review Board Report, and

therefore could not have fully vetted the due process arguments contained in Mr. Hess's Exceptions to the Review Board Report. Likewise, because the United States Supreme Court denied Mr. Hess's Petition for A Writ of Certiorari, the U. S. Supreme Court never engaged in a full or plenary review of Mr. Hess's due process arguments as to the Illinois disciplinary action. To date, no state or federal court of law has issued any written opinion or decision which rules upon Mr. Hess's due process arguments in the Illinois disciplinary matter.

At page 35 of her Brief, Disciplinary Counsel argued that Mr. Hess suffered no deprivation of due process. However, her Brief fails to specifically address the multiple and specific substantive and procedural due process violations committed by the Hearing and Review Boards in the state of Illinois, which have been listed in Mr. Hess's Brief. This Court should be aware of significant and uncontradicted testimony from several witnesses before the Hearing Board, whose important testimony was not addressed by the Hearing Board at any point in its Report to the Illinois Supreme Court. This testimony is in direct conflict with the significant findings and recommendations in the Hearing Board Report. Mrs. Loyd never testified in any fashion about the attorney lien. (R. 209-217) Mr. Loyd admitted that no one told him that he could not get his settlement money until after the attorney lien was settled. Mr. Loyd was aware the attorney fees would be put into escrow. (R. 176) Mr. Loyd agreed that the notice of the attorney lien would not affect the amount of money he got in any event. (R. 179) Mr. Loyd admitted that after a while Mr. Carr told the court that there was no point in the Loyds not

getting their money. (R. 173) Mr. Blan admitted that although his memory is vague on the subject, he did recall on one or two occasions in the Judge's chambers Mr. Carr said that the Loyds could get their money earlier and quicker. (R. 291) Mr. Blan admitted that he does not know that he ever told the Loyds that Mr. Carr was the one responsible for keeping the money from them. (R. 296) Mr. Blan never heard Mr. Kanoski tell the Loyds that Mr. Carr was the one responsible for keeping the money from them. (R. 296) Mr. Kanoski during his testimony made no statement that the Loyd attorney lien purportedly delayed the payout to the Loyds of their client portion of the total settlement in the Loyd case, or that Mr. Carr was responsible for delaying the payout of the client money to the Loyds. (R. 62-147) Mr. Carr testified that Mr. Hess never ever even appeared to be mad at the Loyds and there was nothing malicious in Mr. Hess's heart that Mr. Carr could see that Mr. Hess ever said or exhibited against the Loyds. (R. 522) Mr. Hess testified that Mr. Carr had previously testified that Carr would not have taken Mr. Hess's case if Mr. Hess had come in wanting to harass people. Mr. Hess testified that he was after justice through Mr. Carr's office, not to harass anyone. (R. 535) Mr. Hess denied at any time attempting to harass anybody. Mr. Hess is not that kind of a person. (R. 578) The first Loyd lien Judge (J. Eder) tried to reach a settlement on the Loyd lien, but Mr. Blan, Mr. Ripplinger, and Mr. Kanoski would not settle the lien matter, so the Judge said Mr. Carr would just have to bring a lawsuit against Mr. Hess's clients, the Loyds. That same trial

judge did not find or rule that the Loyd lien was baseless, meritless, or frivolous. (R. 339; 399-400; 444) (Hearing Board Report, pp. 3-44)

(MISSOURI)

Even placing aside the multiple legal/factual errors and the substantive and procedural due process violations committed in the Illinois disciplinary matter, this Honorable Court should not impose reciprocal discipline upon Mr. Hess in Missouri under Rule 5.20 because Mr. Hess's conduct only as a party/client in Illinois is also not a proper legal ground for discipline in the state of Missouri, which legal determination is necessary before discipline can be imposed in the state of Missouri. *In Re: Storment, Jr.*, 873 S.W.2d 227, 230 (Mo. banc 1994). In the same case, this court held: "This court makes its own independent judgment as to the fitness of the members of its bar." Id. at 230. Missouri's Rule of Professional Conduct 4-3.1 is identical to that in the state of Illinois, and in fact predated Illinois' Rule by several years. Missouri's Rule 4-3.1 with Comment (2007) also makes clear that said Rule only has legal application/jurisdiction over an attorney advocate who brings or argues a case or matter in a judicial proceeding on behalf of his or her client. Mr. Hess never represented any client in *Hess v Loyd* or the three lien matters set out in Counts I and II of the Complaint in the Illinois disciplinary matter. The bottom line here is that Mr. Hess in Illinois did not practice law for a client nor was he an advocate for a client, but he himself was always the client of Mr. Carr and The Rex Carr Law Firm. Mr. Hess's party/client

conduct in Illinois is not a proper legal ground for professional misconduct discipline in Missouri under Rule 5.20. (App. 15)

Almost 120 years ago, in *Walker v. Mullins*, 31 S.W. 744, 745, (Mo. 1895), this Court stated that it had an inherent power and control over an attorney, "and may for good cause – that is, for professional misconduct – suspend him from the practice.... But, in order to authorize the court to strike the name of an attorney from the rolls, the charge against him must be with respect of some professional misconduct, and not with respect of acts not connected with his duties as such." (Emphasis added.) "'Professional misconduct' as applied to a lawyer, may be defined as the willful and intentional commission of, or omission to do or perform, an act in connection with the practice of his profession." *In Re: Williams*, 113 S.W.2d 353, 357 (Mo. App. 1938). (Emphasis added.) "Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In Re: Lim*, 210 S.W.3d 199, 201 (Mo. banc 2007) and *In Re: Madison*, 282 S.W.3d 350, 352 (Mo. banc 2009). (Emphasis added.) Also the practice of law in the state of Missouri has been defined by this Court as follows:

> "Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law." *Hoffmeister v. Tod*, 349 S.W.2d 5, 16 (Mo. banc 1961)

Missouri's Rule of Professional Conduct 4-3.1, (App. 13-14), like the Illinois Rule 3.1, makes it perfectly clear that said Rule applies only to the advocate who is representing his or her client, and the Rule makes no mention of jurisdiction over a client being represented by his or her lawyer advocate. Missouri's Rule 4-3.1 even lists the "Topic" of the Rule as follows: "Advocate-Meritorious Claims and Contentions." (Emphasis added) The Rule does not state: "Client-Meritorious Claims and Contentions." The word "advocate", which is an integral part of the above Missouri Rule, has been defined as follows: "It is our opinion that if one appears before any court in the interest of another, and moves the court to action with respect to any matter before it of a legal nature, such person appears as an advocate as that term is generally understood." *Automobile Club of Missouri v. Hoffmeister*, 338 S.W.2d 348, 355 (Mo. App. 1960) (Emphasis added.) The rules of professional conduct have the force and effect of a judicial decision. Accordingly, they have "the force and effect of law in Missouri." *Londoff v. Vuylsteke*, 996 S.W.2d 553, 557 (Mo. App. 1999)

Because Rule 4-3.1 is the law in the state of Missouri, it must not be distorted into providing reciprocal disciplinary jurisdiction over a client such as Mr. Hess, who was not acting as an advocate in the Illinois judicial proceedings, but he was being represented by Mr. Bruce Carr and The Rex Carr Law Firm. Implicit in the concept of due process is the idea that government must follow its own rules. *Layton v. Swapp*, 484 F.Supp. 958 (USDC, N.D. of Utah, 1979) "The

right to pursue one's profession is a fundamental 'liberty' within the meaning of the Fourteenth Amendment's due process guarantee." *Ludtke v. Kuhn*, 461 F.Supp. 86, 98 (1978). The substantive aspect of due process protects individuals from arbitrary or irrational action on the part of the state.... When a liberty interest is impaired by the arbitrary action of government, the constitutional guarantee of due process has been violated. *Kindem v. City of Alameda*, 502 F.Supp. 1108, 1113 (1980). Consequently, this Court should refuse to impose reciprocal discipline under Missouri Rule 5.20 upon Mr. Hess as a client, who did not commit "professional misconduct" in another jurisdiction, as required by Missouri Rule 5.20. (App. 15)

CONCLUSION

For all the reasons and legal authorities mentioned above, Respondent Lawrence Joseph Hess respectfully requests that this Court deny Informant's Motion for Reciprocal Discipline in Missouri under Rule 5.20, finally dismiss the Information filed in this Court pursuant to Supreme Court Rule 5.20, and find Lawrence Joseph Hess not guilty of any professional misconduct in the state of Missouri, with costs herein to be taxed against Informant.

Respectfully submitted,

/s/Lawrence Joseph Hess
Lawrence Joseph Hess, Respondent,
Pro Se
Missouri Bar #24789

Of Counsel to
The Rex Carr Law Firm, LLC
401 Alta Dena Court
St. Louis, MO 63130
314-725-9894 (Telephone)
Lawrencejhess7@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2013 I electronically filed the foregoing with the Clerk of the Missouri Supreme Court using the electronic filing system and notice will be electronically sent to the following counsel through said system:

Sharon K. Weedin
Staff Counsel
Office of Chief Disciplinary Counsel
3335 American Avenue
Jefferson City, MO 65109

/s/*Lawrence Joseph Hess*
Lawrence Joseph Hess

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 16,080 words, according to Microsoft Word, which is the word processing system used to prepare this brief.

/s/Lawrence Joseph Hess
Lawrence J. Hess